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Public Prosecutor v Karpal Singh

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–6 OF 2000
AUGUSTINE PAUL J
21 JANUARY 2002

B ***Criminal Procedure*** *— Trial — Observer — Application for certain persons to be granted observer status — Defendant did not have confidence in presiding officer — Whether defendant could apply for non parties to be granted observer status*

The accused, an advocate and solicitor, was charged with an offence of sedition. When the case was called up for hearing, the accused C applied for certain persons to be granted observer status.

Held, dismissing the application:

(1) The concept of open justice had two aspects; firstly, with regard to proceedings in the court itself it required that they should be held in open court to which the press and public were admitted D and, secondly, in criminal cases at any rate, all evidence communicated to the court must be communicated publicly. This ensured transparency in court proceedings (see p 663D–E).

(2) Any person who wished to 'observe' a particular trial may do so as a member of the public as provided by law. In any event, granting observer status to a person on the ground, inter alia, that it was E necessary as a party did not have confidence in the presiding officer transcended the boundaries of transparency and translated and transformed itself into a transgression and translocation of the well-entrenched and translucent judicial system. It would result in the court allowing itself to be supervised and would amount to an F interference with the due administration of justice. This would militate against the concept of an independent judiciary, which must perform its functions without fear or favour. In the circumstances, the court dismissed the application made by the accused (see p 663E–G).

G **Obiter**:

In view of the serious nature of the allegations raised by the accused, the learned judge referred his conduct to the disciplinary board of the Malaysian Bar for possible disciplinary action. The contemptuous nature of the allegation made by the accused did H not deprive the disciplinary board of the jurisdiction to inquire into the complaint. An advocate and solicitor may be disciplined even though the conduct or the act in question had nothing to do with his character as a solicitor (see pp 663G–H, 664B).

I **[Bahasa Malaysia summary**

Tertuduh, seorang peguambela dan peguamcara, telah dituduh kerana kesalahan hasutan. Apabila kes tersebut dipanggil untuk

perbicaraan, tertuduh telah memohon agar beberapa orang tertentu diberikan status pemerhati. A

Diputuskan, menolak permohonan tersebut:

(1) Konsep keadilan terbuka mempunyai dua aspek; pertama, prosiding di mahkamah itu sendiri menghendaki prosiding-prosiding tersebut diputuskan di mahkamah terbuka di mana terdapat sidang akhbar dan orang awam dan, kedua, dalam kes-kes jenayah, semua keterangan yang disampaikan kepada mahkamah mesti disampaikan secara terbuka. Ini adalah untuk memastikan terdapat ketelusan dalam prosiding mahkamah (lihat ms 663D–E). B C

(2) Sesiapa yang berhasrat untuk 'memerhati' satu perbicaraan tertentu boleh berbuat demikian sebagai seorang ahli awam seperti mana yang diperuntukkan oleh undang-undang. Dalam apa keadaan, dengan memberikan status pemerhati kepada seseorang atas alasan, antara lain, bahawa ia adalah perlu kerana satu pihak tidak mempunyai keyakinan dalam pegawai kehakiman tersebut jelas mengatasi lunas-lunas ketelusan dan terjumlah kepada satu pelanggaran sistem perundangan yang telah berakar umbi dan telus. Ia akan mengakibatkan mahkamah membenarkan dirinya dikawal dan akan menyebabkan campur tangan dalam pentadbiran keadilan yang sewajarnya. Ini akan menyekat konsep kehakiman yang bebas, yang mesti melaksanakan fungsi-fungsinya tanpa rasa bimbang atau memihak kepada sesiapa. Dalam keadaan demikian, mahkamah menolak permohonan yang dibuat oleh tertuduh (lihat ms 663E–G). D E

Obiter: F

Berhubung sifat serius dakwaan-dakwaan yang ditimbulkan oleh tertuduh, hakim yang arif telah merujuk perbuatan tertuduh kepada lembaga tatatertib Majlis Peguam Malaysia untuk tindakan tatatertib yang sepatutnya. Sifat penhinaan dalam dakwaan tertuduh tidak menghalang bidang kuasa lembaga tatatertib untuk menyiasat aduan tersebut. Seorang peguambela dan peguamcara boleh dikenakan tindakan tatatertib walaupun perbuatan atau tindakan yang dipersoalkan tiada kaitan dengan sifat beliau sebagai seorang peguam (lihat ms 663G–H, 664B).] G

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Notes

For cases on trials generally, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3812–4322.

Cases referred to I

AG v Leveller Magazine Ltd [1979] AC 440 (refd)
DP Vijandran v Karpal Singh & Ors [2000] 3 MLJ 22 at p 54 (refd)

Gopalan Nair, Re [1993] 1 SLR 375 (refd)
Gopalkrishna Gupthan v Ammalu Ammal AIR 1972 Ker 196 (refd)
Govinda Narayan Singh v Sham Lal Singh AIR 1931 PC 89 (refd)
Jaginder Singh & Ors v Attorney General [1983] 1 MLJ 71 (refd)
Karam Singh v PP [1975] 1 MLJ 229 (refd)
Koperasi Serbaguna Taiping Barat Bhd v Lim Joo Thong [1999] 6 MLJ 38 (refd)
Kumar Gopika Raman Roy v Atal Singh AIR 1929 PC 99 (refd)
Kumaraendran, Re, an advocate and solicitor [1975] 2 MLJ 45 (refd)
TT Rajah, Re 1 MLJ 79 (refd)
Zainur bin Zakaria v PP [2000] 3 MLJ 604 (refd)
Zainur Zakaria, Re [1999] 2 MLJ 577 (refd)

Legislation referred to

Criminal Procedure Code s 7
Evidence Act 1950 ss 40, 42, 45
Legal Profession Act 1976 ss 42(1)(a), (g), 94(3)(a)

Appeal from: Arrest Case No 3–62–5 of 2000 (Sessions Court, Kuala Lumpur)

Abdul Gani Patail (*Yaacob Mohamad, Chan Bee Keng* and *Duncan Sikodol* with him) for the prosecution.

Karpal Singh (*Gobind Singh Deo, Jagdeep Singh Deo* and *Ram Karpal Singh Deo* with him) (*Karpal Singh & Co*) for the accused.

Augustine Paul J: In this case, Mr Karpal Singh ('the accused'), an advocate and solicitor, was charged with an offence of sedition. When the case was called up for hearing before me on 14 January 2002, the accused applied for certain persons to be granted observer status. The persons on whose behalf he made the application are:

(i) Mr Richard Gates QC, President of the Law Society of British Columbia;

(ii) Mr Mark Trovell QC, Law Council of Australia, the Australian Bar Association and the Criminal Lawyers' Association of Australia;

(iii) Dato Param Coomarasamy, the UN Special Rapporteur for the Independence of Judges and Lawyers;

(iv) Mr Leslie AK James, for the High Commissioner of Canada;

(v) Mr Denise Miller, for the High Commissioner of Australia; and

(vi) Mr John Marshall, for the High Commissioner of Britain.

When I commented that they can be present in court as the court is open to the public the accused said:

> Observer status ought to be given as they have come here specially to observe this trial and for the reason that this is the first time a defence counsel is being charged for carrying out his duties. This has been done in the past. In all cases involving the public interest and matters in particular that affect the legal

> profession, this has been allowed. There has been no objection by any judge. The judiciary should not object to the subject of observation. There ought to be transparency.

When I asked him whether the presence of observers will affect the independence of the judiciary the accused replied as follows:

> The answer to that is simple. No doubt judges are obliged to uphold the rule of law and uphold the Constitution, in particular art 5(1). The judge must keep within the parameters of the law. In particular, Yang Arif has been known that in the case of *Dato Seri Anwar Ibrahim* when a defence counsel was cited for contempt by Yang Arif and sentenced to imprisonment. In the appeal, the Federal Court found that Your Lordship acted more as a prosecutor than as a judge. The finding made by the Federal Court that Yang Arif acted more as a prosecutor and with that finding it is more important that you should be observed. Rightly, you should have been tribunalized. It is as clear as a pikestaff that having regard to the finding by the Federal Court there ought to be observers. That will ensure that nothing goes amiss. Above and beyond this, our criminal justice system itself will be on trial. I have filed an application to have Your Lordship disqualified.

The remarks of the Federal Court that the accused relied on in his argument is, I believe, that part of the judgment of Abdul Malek Ahmad FCJ in *Zainur bin Zakaria v PP* [2000] 3 MLJ 604, an appeal from my judgment at first instance in *Re Zainur Zakaria* [1999] 2 MLJ 577, where his Lordship said at p 636:

> The manner he conducted the proceedings, in particular the interrogation of the appellant and the speedy finding of guilt without even allowing the appellant to call any witness, gave the picture that he was behaving as though he was acting as counsel for the two prosecutors in the motion.

I must place on record the fact that I had accepted the remarks of Abdul Malek Ahmad FCJ with all humility and continue to do so. The remarks are from the Federal Court and must be respected. However, the remarks have now been hurled back at me by the accused, though in a different form as I will explain later, with the explosive and detonative intention of rocking the very chair on which I sit.

The conclusion of the accused that I acted more as a prosecutor than as a judge, even if it is a correct analysis of the remarks of Abdul Malek Ahmad FCJ, is at its highest a finding of fact by the Federal Court. It has been authoritatively laid down by the Privy Council in *Kumar Gopika Raman Roy v Atal Singh* AIR 1929 PC 99 that:

> The Indian Evidence Act does not make finding of fact arrived at on the evidence before the court in one case evidence of that fact in another case.

In *Govinda Narayan Singh v Sham Lal Singh* AIR 1931 PC 89, it was observed by the Privy Council that a finding of fact recorded by a court is also not relevant in another subsequent suit in a case in which the parties are different. In *Gopalkrishna Gupthan v Ammalu Ammal* AIR 1972 Ker 196, Narayana Pillai J said at p 197:

> Judgments not coming under ss 40 to 42 are not relevant at all in respect of opinion expresses therein. They can amount only to opinion evidence and

> opinion evidence is generally inadmissible. Such opinion evidence is, however, admitted under s 45 of the Evidence Act when the court has to form an opinion upon a point of foreign law, or of science or art or as to identity of handwriting but in such cases it is the duty of the court to scrutinize the soundness or validity of opinion evidence exercising its own independent judgment. In the case of a previous judgment such scrutiny is impossible because the court trying the subsequent case cannot reopen the case and hear it on the merits as if the court is hearing an appeal or is retrying the previous case on fresh evidence. The court in the subsequent case has to decide it on the materials before it exercising its own independent judgment. Therefore my conclusion is that judgments qua judgements and an expression of opinion of the courts which pronounce them are not relevant at all except under ss 40 to 42 of the Evidence Act.

In adopting the above passage, Kamalanathan Ratnam J said in *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22 at p 54:

> I agree and accept the views of the learned judge. I am therefore compelled to conclude that there is nothing in the Evidence Act to warrant the conclusion that the statements or findings of facts in another case can be used as evidence in a subsequent case to decide the points which are in issue in the subsequent case.

Thus, it is manifestly patent that the remarks attributed to the Federal Court are not relevant and cannot be used in this or any other proceeding. Its relevance is limited only for the purpose of the judgment of Abdul Malek Ahmad FCJ.

Unfortunately, the matter does not end there. If the accused had merely repeated the remarks of Malik Ahmad FCJ, I could have dealt with the matter with ease in light of the law that I have just highlighted. However, he had gone on to give his own interpretation of the remarks which is not an accurate summary of what was stated and, to make matters worse, followed it with some allegations. Abdul Malek Ahmad FCJ merely stated that my conduct '... gave the picture ...' that I was behaving as though I was '... acting as counsel for the two prosecutors in the motion'. What it means is that my conduct gave the impression that I was protecting or assisting the two prosecutors. It does not mean that I did in actual fact protect or assist them. It only appeared to be so. On the other hand, the accused said that the Federal Court had found that I had acted more as a prosecutor than as a judge. That is a positive averment. What merely gave a picture of protection or assistance has been converted into one of actual misuse of my role. The accused then went a step further to say that I ought to be observed in the conduct of the proceedings before me, in order to ensure that nothing goes amiss and that I ought to have been tribunalized. These allegations have serious implications. They cannot be dismissed outright.

It now behoves upon me to analyze the validity of the interpretation by the accused of the remarks made by Abdul Malek Ahmad FCJ. I must emphasize that my analysis is only of the interpretation by the accused of the remarks made by Abdul Malek Ahmad FCJ. Thus, it is not my intention, in such consideration, to impinge upon the remarks made by Abdul Malek Ahmad FCJ in any way. It must be observed that *Zainur*

Zakaria which the accused referred to is a case involving a contempt in the face of the court. The role of a judge in such a proceeding is different as compared to a normal trial. I have explained this in clear terms in my judgment at p 596 in the following words:

> Raja Azlan Shah AG LP (as his Highness then was) in writing for the Federal Court in *Jaginder Singh & Ors v Attorney General* [1983] 1 MLJ 71, said that summary contempt procedure requires that the judge should not only be both prosecutor and adjudicator, but should also have been witness to the matters to be adjudicated upon. Thus, it is clear that a contempt proceeding is far removed from the procedure as in a normal trial that we are all so used to. It requires no complaint, there is no charge, there is no trial in the strict sense of word, the rights of a person proceeded against are restricted, it is arbitrary, the court may be judge and party at the same time and it is contrary to some of the rules of natural justice.

Thus, anyone with some knowledge of the law of contempt will know that the role of a judge who conducts a proceeding for contempt in the face of the court will be that of a prosecutor and judge. This is so as the proceeding is between the court, and the contemnor as it is initiated by the court which must therefore, as of necessity, play an active role. No fixed procedure has been laid down in dealing with contempt cases. As the book entitled *Law of Contempt of Courts, Legislatures and Public Servants* (9th Ed) by KJ Aiyar says at p 38:

> The High Courts could adopt any procedure subject to its fairness and affording reasonable opportunity for defence.

There can, therefore, be no objection to a contemnor being questioned by the Court. In fact, in *Koperasi Serbaguna Taiping Barat Bhd v Lim Joo Thong* [1999] 6 MLJ 38, Zulkefli J did so after the contemnor had shown cause. The role of a judge in such a proceeding in acting as adjudicator and prosecutor cannot, thus, be the basis of adverse comment as it is a role that had been eloquently painted by the hands of law itself and has been recognized by our Federal Court in many cases. To use the portrayal of such a role against me is, therefore, clearly inconsistent with the law of contempt. To further say that in the circumstances I must be observed in the conduct of this proceeding in order to ensure that nothing goes amiss and that I ought to have been tribunalized is and cannot in law be supported by the ground on which it is based. This is compounded by the fact that the accused has appeared before me as counsel in other cases without raising any objection. The bona fides of the allegations made by the accused that I must be observed in order to ensure that nothing goes amiss and that I ought to have been tribunalized are, therefore, brought into sharp focus. Even if my analysis of the accused's interpretation of the remarks of Abdul Malek Ahmad FCJ are incorrect, the resultant allegations made by him, based on a matter which is irrelevant to this proceeding as I explained earlier, cannot be justified. Nor, in any event, can they ever be justified. They amount to an open and blatant attack on the independence of the judiciary. They are an affront to my impartiality and constitute the biggest threat and insult not only to me but also to the entire judiciary. They strike

A at the very core and foundation of the institution of justice and the democratic process as enshrined in the Federal Constitution. They are contemptuous. The fundamental ground of the accused's application based on his interpretation of Abdul Malek Ahmad FCJ's remarks thus falls flat. It follows that his allegations anchored on the basic premise have therefore only to be stated to be rejected though their implications are far too serious
B to be ignored.

The argument of the accused that the granting of observer status is necessary to ensure transparency of proceedings is the advancement of a reason without an understanding of what it means.

Transparency in a court proceeding is ensured by the fact that it is
C conducted in public and that any member of the public is entitled to watch the proceeding. This is expressly provided by s 7 of the Criminal Procedure Code which reads as follows:

> The place in which any criminal court is held for the purpose of inquiring into or trying any offence shall be deemed as open and public court to which the
D public generally may have access.

The concept of open justice has two aspects; firstly, with regard to proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and, secondly, in criminal cases at any rate, all evidence communicated to the court is communicated
E publicly (see *AG v Leveller Magazine Ltd* [1979] AC 440). This ensures transparency in court proceedings. In my opinion, therefore, any person who wishes to 'observe' a particular trial may do so as a member of the public as provided by law. In any event, granting observer status to a person on the ground, inter alia, that it is necessary as a party does not have confidence in the presiding officer transcends the boundaries of
F transparency and translates and transforms itself into a transgression and translocation of the well-entrenched and translucent judicial system. It will result in the court allowing itself to be supervised and will amount to an interference with the due administration of justice. This will militate against the concept of an independent judiciary which must perform its functions without fear or favour. In the circumstances, I dismissed the application
G made by the accused.

In view of the serious nature of the allegations raised by the accused, I referred his conduct to the disciplinary board of the Malaysian Bar Council for possible disciplinary action. The contemptuous nature of the allegation made by the accused does not deprive the disciplinary board of
H the jurisdiction to inquire into the complaint. In this regard, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (2nd Ed) by Tan Yock Lin says at p 795:

> Conduct which is a contempt of court will be grossly improper conduct. Conduct which amounts to contempt of court would seen a fortiori to deserve serious disciplinary sanction (eg *Re TT Rajah* [1973] 1 MLJ 79). Perhaps this
I is why the court will be slow to exercise the power of summary judgment for contempt in the face of the court and will prefer instead to refer even conduct which is contempt in the face of the court to the Council for the purpose of

disciplinary sanction (eg *Re Kumaraendran, an Advocate and Solicitor* [1975] 2 MLJ 45; *Karam Singh v PP* [1975] 1 MLJ 229). A

I am aware that at the material time, the accused was in court not in his capacity as an advocate and solicitor. That does not absolve him from liability as s 94 of the Legal Profession Act 1976 ('the Act') refers to the conduct of an advocate and solicitor '... in a professional capacity or otherwise ...'. This is manifested by s 94(3)(a) of the Act which refers to a conviction of a criminal offence which makes an advocate and solicitor unfit to be a member of his profession. This is widely worded to include a conviction not incurred by an advocate and solicitor in such capacity. Thus, an advocate and solicitor may be disciplined even though the conduct or the act in question had nothing to do with his character as a solicitor (see *Re Gopalan Nair* [1993] 1 SLR 375). B C

With regard to the application by the Bar Council, represented by Mr Roy Rajasingham, to hold a watching brief, the honourable Attorney General said that he has no objection unless the court thinks otherwise. I then asked Mr Roy Rajasingham the purpose of the Bar Council holding a watching brief. He referred to s 42(1)(a) and (g) of the Act and said: D

> Under these two provisions, the Bar Council looks not only at interests of members but also of the public. I have appeared in other courts. The Bar Council has been allowed to sit and hold a watching brief. In this case, a senior member of the Bar who is a credit to the Bar and the legal profession. We have, therefore, taken the liberty to come to this court and address the court as to holding a watching brief. E

The honourable Attorney General replied that he did not object to the application earlier on the basis that the Bar Council was seeking to hold a watching brief for the accused. He added that if the watching brief was for the entire Bar Council it should not be allowed. Mr Roy Rajasingham then said: F

> The status I am seeking is to represent the Bar and not Mr Karpal. There is a function that we can play if the need arises. We are here with a purpose.

As a representation for the entire Bar Council requires an independent mind, I asked Mr Roy Rajasingham about a resolution that the Bar Council had earlier passed with regard to the charge against the accused. He said: G

> I do not know what this resolution is all about.

Since the Vice-President of the Bar Council had no knowledge of a resolution passed by the Bar Council, I decided not to pursue the matter any further as I could have been mistaken. I then explained carefully to Mr Roy Rajasingham that a better articulated rationale for him to apply to hold a watching brief for the Bar Council would have been to say that the issue involved in this case affects all lawyers, it is, therefore, necessary for the Bar Council to be present during the entire proceedings; that the Bar Council may be of assistance to the court; and that the Bar Council may be in a more informed position to advise its members on the outcome of the case. Mr Roy Rajasingham adopted this reasoning and the honourable H I

A Attorney General said that he has no objection now. I then asked Mr Roy Rajasingham:

> Do you confirm that you are here with an independent mind for the betterment of the Bar?

He replied:

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> We want to see that justice is done.

I asked him to explain whether his answer means that without the presence of the Bar Council justice will not be done. He quickly withdrew the statement that he had made. I then allowed the Bar Council to hold a watching brief.

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Very soon after the unfortunate incident, the honourable Attorney General withdrew the charge against the accused and I duly acquitted and discharged him.

Application dismissed.

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Reported by Peter Ling

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